

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

Docket No. 160,435

ORDER

On the 21st day of June, 1994, the application and request for review by the Workers Compensation Appeals Board of an award entered by Administrative Law Judge Shannon S. Krysl dated April 29, 1994, filed by the respondent, Lamar Distribution Services, Inc., and its insurance carrier, Hanover Insurance Company, came on before the Appeals Board for oral argument.

APPEARANCES

Claimant appeared by her attorney, James B. Zongker of Wichita, Kansas. The respondent, Lamar Distribution Services, Inc. and its insurance carrier, Hanover Insurance Company, appeared by their attorney, Kim R. Martens of Wichita, Kansas. The respondent, John Sexton and Company, and its insurance carrier, CNA Insurance Company, appeared by their attorney, John David Jurcyk of Lenexa, Kansas. The Kansas

Workers Compensation Fund appeared by its attorney, James Roth of Wichita, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the award of the administrative law judge is that considered by the Appeals Board.

STIPULATIONS

The stipulations of the parties as set forth in the award of the administrative law judge are those adopted by the Appeals Board.

ISSUES

The administrative law judge found that claimant was entitled to permanent partial general disability benefits based upon a forty percent (40%) work disability. The administrative law judge apportioned liability and assessed twenty five percent (25%) to Lamar Distribution Services, Inc. and its insurance carrier and seventy five percent (75%) to John Sexton and Company and its insurer. The respondent Lamar Distribution Services, Inc. and its insurance carrier, Hanover Insurance Company, have filed this request for review and ask the Appeals Board to review the findings of the administrative law judge. The issues now before the Appeals Board are:

(1) Did the administrative law judge err in failing to enter separate awards for both alleged dates of accident?

(2) Did the administrative law judge err in failing to apply the presumption of no work disability when determining the liability of Lamar Distribution Services?

(3) Was there permanent aggravation arising from the work with John Sexton and Company that would affect the liability of Lamar Distribution Services?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire file, the Appeals Board finds, as follows:

(1) This proceeding should be remanded to the administrative law judge to address those matters designated as issues relative to both periods of alleged accident and issue two separate awards, if indicated.

(2) Claimant alleged personal injury by accident arising out of and in the course of her employment with the respondent, Lamar Distribution Services, Inc., from April 27, 1991 through her last day of employment on May 1, 1991. Claimant also alleges a second, subsequent injury sustained while in the employment of John Sexton and Company during

the period of May 11, 1991 through August 1, 1991. Separate stipulations were taken and separate issues were designated for both dates of alleged accident.

Both of the doctors who testified indicate that claimant's present functional impairment is a combination of the injury of April 27 and subsequent aggravation due to her work activities between April 11, 1991 and August 1991. One of the physicians testified that five percent (5%) of claimant's impairment of function was attributable to her injury at Lamar and the remaining fifteen percent (15%) was attributable to the aggravation she sustained while working for John Sexton and Company. As it appears by the stipulations, pleadings, and overview of the evidence that this matter was tried as two separate injuries, the administrative law judge erred in failing to make two, separate awards and specific findings pertaining to the issues relative to both dates of alleged accident.

The evidence is uncontroverted that claimant initially injured her back on or about April 27, 1991 when she was working for Lamar Distribution Services, Inc. On May 1, 1991, claimant ended her employment with Lamar and on May 11, 1994 began working for higher pay at John Sexton and Company. The administrative law judge is requested to address the issue whether Lamar Distribution Services, Inc. and its insurance carrier, Hanover Insurance Company, are entitled to the presumption of no work disability provided in K.S.A. 44-510e(a) which is applicable to situations where the injured worker subsequently engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.

AWARD

WHEREFORE; it is the finding, order, and decision of the Appeals Board that this case should be, and hereby is, remanded to the Administrative Law Judge to address those issues designated by the parties for both alleged dates of accident and issue two separate awards should the evidence so indicate; that the Appeals Board does not retain jurisdiction of this matter and a new application for review must be filed within the appropriate time limits should an aggrieved party desire the Appeals Board to provide further review.

IT IS SO ORDERED.

Dated this ____ day of July, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: James B. Zongker, Attorney at Law, PO Box 47370, Wichita, KS 67201
Kim Martens, Attorney at Law, 200 W. Douglas, 6th Floor, Wichita, KS 67202
John D. Jurcyk, Attorney at Law, PO Box 14548, Lenexa, KS 66285
James R. Roth, Attorney at Law, 833 N. Waco, PO Box 127, Wichita, KS 67201
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director